

1 **MICHAEL F. PHILLIPS**  
2 **PHILLIPS & BORDALLO, P.C.**  
3 410 West O'Brien Drive  
4 Hagatña, Guam 96910  
5 Telephone (671) 477-2223  
6 Facsimile (671) 477-2329

7 *Attorneys for Petitioner Julie B. Santos and Lead Counsel*

8 **IGNACIO C. AGUIGUI**  
9 **PETER C. PEREZ**  
10 **LUJAN AGUIGUI & PEREZ LLP**  
11 Attorneys at Law  
12 Pacific News Building, Suite 300  
13 238 Archbishop Flores Street  
14 Hagatña, Guam 96910  
15 Telephone (671) 477-8064/5  
16 Facsimile (671) 477-5297

17 *Attorneys for Petitioner Charmaine R. Torres*

**FILED**  
DISTRICT COURT OF GUAM

JUL 26 2007 *nba*

**MARY L.M. MORAN**  
CLERK OF COURT

13 **DISTRICT COURT OF GUAM**

14 **TERRITORY OF GUAM**

16 JULIE B. SANTOS AND CHARMAINE  
17 R. TORRES, on behalf of themselves  
18 and a class of others similarly situated,

19 Petitioners,

20 -vs-

21 FELIX P. CAMACHO, Governor of  
22 Guam; ART ILAGAN, Director of  
23 Department of Revenue and Taxation;  
24 LOURDES M. PEREZ, Director of  
25 Department of Administration; and,  
26 GOVERNMENT OF GUAM,

27 Respondents.

CIVIL CASE NOS. 04-00006 and 04-00038

**REPLY IN SUPPORT OF JOINT  
MOTION OF THE PETITIONERS IN  
SANTOS AND TORRES FOR FINAL  
CERTIFICATION OF THE EIC CLASS  
FOR SETTLEMENT PURPOSES**

**ORIGINAL**

1 Julie B. Santos, Petitioner in CV04-00006, individually and on behalf of all those  
2 similarly situated (hereinafter "EIC Class"), through her attorneys of record Phillips and  
3 Bordallo, P.C., by Interim Class Counsel Michael F. Phillips; and Charmaine R. Torres,  
4 Petitioner in CV04-00038, through her attorneys of record Lujan Aguigui & Perez LLP,  
5 by Peter C. Perez") submit this Reply in Support of Joint Motion for Final Certification of  
6 the EIC Class for Settlement Purposes.  
7

### 8 **ARGUMENT**

9 In their Opposition to Joint Motion for Final Certification of EIC Class for  
10 Settlement Purposes, Janice Cruz and May Grace Simpao (hereinafter "Simpao  
11 Plaintiffs") advance two arguments against certification of the EIC Class as preliminarily  
12 approved by the Court on January 9, 2007. First, the Simpao Plaintiffs argue that  
13 antagonism exists between the class members that somehow compromises the  
14 predominance of questions of law or fact common to the members of the class as  
15 opposed to its individual members. Second, they argue that the class representative  
16 does not fairly and adequately represent the interests of the class. However, as they did  
17 in the past, the Simpao Plaintiffs are merely attempting to defeat certification of the class  
18 and delay meaningful settlement in this matter based upon a farfetched and unrealistic  
19 wish for compensation above that which the settlement provides. Neither claim is  
20 meritorious, and the Court should not entertain or otherwise humor these desperate  
21 attempts to gratuitously attack the validity of the instant settlement.  
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### 24 **QUESTIONS OF LAW AND FACT COMMON TO THE** 25 **MEMBERS OF THE CLASS PREDOMINATE OVER ANY** 26 **QUESTIONS AFFECTING ONLY INDIVIDUAL MEMBERS**

27 The Simpao Plaintiffs first argue that the settlement creates antagonism  
28

1 among class members that defeats the commonality requirement of Rule 23. The  
2 Simpao Plaintiffs specifically reference four areas that purportedly create antagonism  
3 between class members. First, they claim that the settlement fails to account for interest  
4 accumulated for unpaid tax refunds, which would presumably benefit the earlier  
5 settlement years more so than the later years. Second, Simpao Plaintiffs claim that the  
6 structure of the settlement, providing for 1997 payments first, then 1998 then returns to  
7 the earlier years and continues up creates antagonism because "naturally...each year  
8 would prefer to be at the head of the line." P.8-9. Third, Simpao Plaintiffs criticize the fact  
9 that the settlement allows Respondents to accumulate funds prior to disbursement of  
10 compensation to each settlement year. Finally, Simpao Plaintiffs take issue with the fact  
11 that future payments are "predicated on the continued existence of the Reserve Fund."  
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13  
14 In asserting these objections to class certification, Simpao Plaintiffs demonstrate  
15 the same fundamental lack of understanding of the negotiation and settlement process  
16 that has plagued them throughout their litigation. The parties to the settlement  
17 agreement entertained a wide variety of factors, above and beyond the superficial issues  
18 Simpao Plaintiffs have repeatedly raised, in reaching the current settlement. As  
19 previously repeatedly pointed out by the parties to the settlement, compromise is the  
20 cornerstone to settlement. Naturally, neither party is going to secure the maximum  
21 benefit for their client that is potential in full litigation. However, weighed against other  
22 important concerns such as the degree of risk involved in complete litigation and, in the  
23 case of the class, the desire for speedy and meaningful recovery, and it should not be  
24 difficult to understand and accept the parties' willingness to forego full litigation in favor  
25 of recovery through settlement which, though never ideal, accounts for the pressing  
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1 concerns of the parties. Such is the case involving all the factors Simpao Plaintiffs claim  
2 defeat commonality in the class. The decision to forego a claim for interest was weighed  
3 and leveraged in the settlement negotiations, particularly against the backdrop of a  
4 potential statute of limitations bar to recovery for the earlier class years. Though Plaintiffs  
5 Simpao can conveniently *allege* all they want that there is no statute of limitations bar to  
6 recovery implicated for the class years, the issue would most assuredly be subject to  
7 extensive briefing and litigation by the parties, and a potentially belated ultimate  
8 determination by the Court, which would only serve to further exacerbate the injury to the  
9 class and possibly result in a statutory bar to some of the class years. Pitted against  
10 these considerations, the decision to proceed with settlement that does not require  
11 payment of interest was reasonable.

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14 The three remaining issues Simpao Plaintiffs raised that purportedly create  
15 antagonism between class members are related in that they involve the method of  
16 disbursement of settlement funds to the class. Specifically, the settlement creates a  
17 schedule for disbursement largely in place to reasonably accommodate Respondents'  
18 present and future ability to pay for the settlement. In an ideal situation, Respondents  
19 would pay immediately. Indeed, complete litigation would possibly, though not likely,  
20 yield such a result. Rather than proceed at litigation and risk a harsher payment  
21 schedule, Respondents, in settlement, negotiated a manageable payment schedule that  
22 simultaneously alleviates their concerns of being compelled to pay for EIC funds all at  
23 once or without regard for governmental budgeting issues, as well as provides the class  
24 a predictable timetable by which they can expect payment. Contrary to Simpao Plaintiffs'  
25 assertion, creating a reasonable schedule for payment that includes a provision allowing  
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27

1 the government to accumulate funds prior to each disbursement makes it *more* likely that  
2 regular payments will be effected. Significantly, in the meantime, while Class members  
3 await compensation, the government remains in their debt. To the extent that one class  
4 year may stand to recover compensation sooner than another year, such is the case with  
5 the traditional practice of "first in, first out." Further, disbursement in this manner is  
6 consistent with attempts to mitigate the losses attributable to the time that has run  
7 between the date the government should have paid the credit and the date actually paid.

9 To say that these factors create antagonism between the individual class  
10 members and destroys commonality would be severely understating the benefit the  
11 Class derives as a result of this collective action and settlement. There are few opt-outs  
12 and even fewer objections to the proposed settlement. Notably, the claims filed in this  
13 matter demonstrate that the each class year is well-represented despite the alleged  
14 "antagonism" between the years. *See Declaration of John P. Camacho in Support of*  
15 *Motion for Final Approval of Class Action Settlement Agreement*, Exhibit A. Also  
16 noteworthy is the fact that none of the opt-outs or objections, Simpao Plaintiffs excluded,  
17 cite to antagonism between the years as the basis for their actions. The overwhelming  
18 response to the settlement by claimants from all years is support for the settlement, an  
19 indication that individual claimants themselves prefer to proceed in the class action  
20 settlement than persist in an objection or opt-out based upon some purported  
21 antagonism.  
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24 As Petitioners Santos and Torres explained in their Joint Motion for Final  
25 Certification of the EIC Class for Settlement Purposes:

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28 Page 5 of 11

Julie B. Santos and Charmaine R. Torres *et al.* v. Felix P. Camacho *et al.*  
Civil Case Nos. 04-00006 and 04-00038

Memorandum of Points and Authorities in Support of Joint Motion of the Petitioners  
in Santos and Torres for Final Certification of the EIC Class for Settlement Purposes

1 the requirement that common questions of law or fact exist  
2 among class members is satisfied if the named plaintiffs  
3 share at least one question of fact or law with the grievances  
4 of the class. In re Flat Glass Antitrust Litigation, 191 F.R.D.  
5 472, 478 (E.D. Pa. 1999). Petitioners and each EIC class  
6 member have been denied the full implementation of the  
7 earned income tax program as applied on Guam, including  
8 the Government's prohibition or prevention of EIC class  
9 members to file claims for earned income tax refunds and/or  
10 the Government's denial or failure to pay earned income tax  
11 refunds to otherwise qualified Guam taxpayers. Common  
12 questions of law or fact exist among the Petitioners and the  
13 EIC class members. In considering conditional certification,  
14 the Court found that the single fact that "the Petitioners and  
15 class members have been denied both the opportunity to file  
16 for the earned income tax credit ("EIC") for several years and  
17 the recovery of the same" satisfied the requirement of  
18 commonality.

19 *Joint Motion of the Petitioners in Santos and Torres for Final Certification of the EIC*  
20 *Class for Settlement Purposes*, p. 9.

21 Simpao Plaintiffs attempt to analogize the instant class settlement to one  
22 attempted in Amchem Prods. v. Windsor, wherein the Court held "the Rule 23(b)(3)  
23 predominance inquiry tests whether proposed classes are sufficiently cohesive to  
24 warrant adjudication by representation." 521 U.S. 591, 623 (U.S. 1997). The Court  
25 specifically addressed the requirement of predominance in the context of complex  
26 asbestos exposure litigation. Citing to disparities in injuries to individual claimants and  
27 their varying medical expenses, smoking histories, and family situations, as well as to  
28 the fact alone that class members were in varying stages of injury ranging from  
29 claimants with no manifested symptoms to those in advanced stages of illness, the  
30 Court agreed with the Third Circuit's finding that the nuance to individual claimants'  
31 injuries were particularly pronounced and created a circumstance wherein the mere

1 common cause of injury and potential injury did not afford the class sufficient  
2 commonality to meet the requirements of law.

3 By contrast, claimants in the instant matter are not waiting for injury to manifest.  
4 There are no extenuating circumstances that negate the fact that class members all  
5 suffered a present, discrete injury as they were all denied the full implementation of the  
6 earned income tax program as applied on Guam, including the Government's  
7 prohibition or prevention of EIC class members to file claims for earned income tax  
8 refunds and/or the Government's denial or failure to pay earned income tax refunds to  
9 otherwise qualified Guam taxpayers. Under these circumstances, the common injury to  
10 class members is not speculative and the nature of the injury is shared by the class *in*  
11 *toto*, schedule of compensation notwithstanding.  
12

13  
14 The purported antagonism between the class years that Simpao Plaintiffs point to  
15 amounts to no more than reasonable decision-making on behalf of the class and its  
16 individual members and does not destroy the commonality of the class based upon the  
17 distinct, shared injury this Court already found to sufficient to meet the requirements of  
18 Rule 23. For this reason, Petitioners submit that the commonality requirement is met in  
19 this case and Plaintiff Simpao's claims to the contrary should not deter this Court from  
20 granting final class certification.  
21

22 **CLASS REPRESENTATIVE AND CLASS COUNSEL**  
23 **FAIRLY AND ADEQUATELY REPRESENT THE**  
24 **INTERESTS OF THE CLASS**

25 The Simpao Plaintiffs persist in challenging the adequacy of class counsel,  
26 repeating claims that were already previously before the Court in its conditional  
27



1 certification of the EIC class as well as in its appointment of class counsel. The Simpao  
2 Plaintiffs are once more attempting to rehash events in the earlier portion of this matter  
3 to support their claim of class counsel's inadequacy. Specifically, they charge that Class  
4 Counsel made repeated mistakes that proved costly to the class, such as (1) the  
5 original complaint "did not adequately identify or investigate the potential claims in this  
6 action or develop an understanding of the applicable law, (2) the complaint "shows no  
7 attempt to meet the statutory requirements of a tax refund action as Santos never  
8 alleged she had filed tax returns for the relevant years or had otherwise met the  
9 exhaustion requirements of 26 U.S.C. §7422, (3) that counsel, in filing the complaint,  
10 "abandoned Guam citizens with EITC claims for tax years 1995-1997, (4) that counsel  
11 named the wrong party as defendant and "arguably contributed to the resulting battle  
12 between the Governor and the Attorney General." Further, Simpao Plaintiffs allege,  
13 virtually verbatim, the same baseless allegations they asserted in their Opposition to  
14 Petitioner Santos' Amended Petition for Appointment of Lead Counsel regarding  
15 purported political manipulation behind the settlement and Class Counsel's conduct  
16 during fee negotiations.

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19 Notably, Simpao Plaintiffs fail to advance any new or unresolved arguments  
20 against appointment of this Class Counsel. In its Order of January 9, 2007, the Court  
21 set forth the requirements for appointment of Class Counsel:

22  
23 Rule 23(g) states that "[u]nless a statute provides otherwise,  
24 a court that certifies a class must appoint class counsel. An  
25 attorney appointed to serve as class counsel must fairly and  
26 adequately represent the interests of the class." FED. R.  
27 CIV. P. 23(g)(1)(A) and (B). In appointing counsel, Rule  
28 23(g) requires the court to consider the work counsel has  
done in "investigating potential claims in the action,



1 counsel's experience in handling class actions, other  
2 complex litigation, and claims of the type asserted in the  
3 litigations, counsel's knowledge of the applicable law, and  
4 the resources counsel will commit to representing the class;  
5 . . ." FED. R. CIV. P. 23(g)(1)(C). The court may also  
6 consider "any other matter pertinent to counsel's ability to  
7 fairly and adequately represent the interests of the class." Id.

8 *Order Granting Joint Motion for Preliminary Approval of Class Action Settlement*  
9 *Agreement, Joint Motion of the Parties for Conditional Certification of the EIC Class for*  
10 *Settlement Purposes, Amended Motion for Appointment of Lead Class Counsel*, p 9. The  
11 Court held as "evident" that "[Attorney Phillips] has the requisite experience in handling  
12 class actions to be able to advocate on behalf of the class in this instance." *Id.* at 10.

13 The Court further noted

14 that Attorney Phillips has a long history of taking on cases  
15 where the interests of the disenfranchised and downtrodden  
16 are involved. In addition, he has challenged the  
17 administration of every sitting Governor of Guam since his  
18 admission to the practice of law approximately 17 years ago.  
19 This case concerns the government's failure to pay the EIC,  
20 an income tax credit for low-income working individuals and  
21 families. Attorney Phillips has spent years trying to get the  
22 government to pay the EIC and went so far as to obtain a  
23 ruling in 2001 from the Supreme Court of Guam that the EIC  
24 was applicable to Guam and that the Governor had to  
25 enforce and administer the EIC. While this ruling seemingly  
26 did not change the government's policy and practice of  
27 paying the EIC, Attorney Phillips filed the instant suit to  
28 further pursue the matter.

In light of Attorney Phillips' class action experience and work  
on this case, the court hereby appoints him as the lead class  
counsel for the Class, having determined that the  
requirements of Rule 23(g) of the Federal Rules of Civil  
Procedures are fully satisfied by this appointment.

*Id.* at 10.

1 The Court's previous findings that Class Counsel fulfilled the requirements of  
2 23(g) were not conditional or somehow subject to a lower standard during Conditional  
3 Certification of the Class. Simpao Plaintiffs' current application regarding the supposed  
4 inadequacy of Class Counsel is tantamount to an ad hoc attempt at reconsideration.  
5 Simpao Plaintiffs are not, however, arguing that Class Counsel's conduct since  
6 appointment has demonstrated further purported inadequacies. Without new law, new  
7 evidence, or even new argument, the circumstances exist today as they did at the time  
8 the Court appointed Class Counsel. Evidence considered by the Court when it  
9 determined that the requirements of 23(g) are met is still intact and applicable. Class  
10 Counsel remains knowledgeable regarding the applicable law, has demonstrated the skill  
11 necessary to litigate the interests of the Class, and has devoted sufficient resources to  
12 investigating and prosecuting the interests of Class members. The Court has already  
13 considered and dismissed the superfluous, unmeritorious and plainly repetitive  
14 objections of Simpao Plaintiffs to Class Counsel. Class Counsel submits that there is  
15 insufficient reason, if there is reason at all, to revisit or otherwise reconsider appointment  
16 of Class Counsel in the absence of affirmative allegations of misconduct or inappropriate  
17 actions on the part of Class Counsel.

20 Finally, Simpao Plaintiffs conclusory request that their counsel instead be  
21 appointed lead counsel is out of place and unsupported by any arguments, let alone  
22 sufficient arguments, in their brief. Class Counsel submits that Simpao Plaintiffs  
23 qualifications to this end are as hollow as their brief. In the event Simpao Plaintiffs intend  
24 to seriously pursue appointment of their attorney as Class Counsel, Class Counsel would  
25 vehemently oppose. However, such opposition is premature at this juncture without an  
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1 offer from Simpao Plaintiffs regarding adequacy of their preferred counsel. Petitioners  
2 submit that any attempts by Simpao Plaintiffs to supplement their vague application for  
3 appointment of their preferred counsel are untimely and do not merit serious  
4 consideration by this Court.

5  
6 **CONCLUSION**

7 For the reasons stated herein, the Petitioners respectfully request that the  
8 Court grant final certification of the EIC class for settlement purposes.

9 Respectfully submitted this 26<sup>th</sup> day of July, 2007.

10  
11 **PHILLIPS & BORDALLO, P.C.**  
12 Interim Class Counsel & Attorneys for  
13 Petitioner Julie Babauta Santos

14 By:   
15 **MICHAEL F. PHILLIPS**

16 **LUJAN AGUIGUI & PEREZ LLP**  
17 Attorneys for Plaintiff Charmaine R.  
18 Torres

19 By:   
20 **IGNACIO C. AGUIQUI**